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No. 01-1617

In the Supreme Court of the United States

EARL ATWOOD, ET AL.,
Petitioners

v.

BURLINGTON NORTHERN AND SANTA FE RAILROAD COMPANY, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATES OF WEST VIRGINIA, PENNSYLVANIA, COLORADO, DELAWARE, FLORIDA, IDAHO, INDIANA, IOWA, MISSOURI, MONTANA, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS AND UTAH, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

SCOTT E. JOHNSON*
Senior Assistant Attorney General
**Counsel of Record*

State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
(304) 558-2021

KATHERINE A. SCHULTZ
Senior Deputy Attorney General
[Additional counsel on inside cover]

26 pgs

D. MICHAEL FISHER
Attorney General of Pennsylvania
JOHN G. KNORR, III
Chief Deputy Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17102
(717) 787-1144

KEN SALAZAR
Attorney General of Colorado
1525 Sherman Street, 7th Floor
Denver, CO 80203
(303) 866-3557

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801
(302) 577-8400

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-10
(850) 414-3300

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5164

ALAN G. LANCE
Attorney General of Idaho
Office of Attorney General
700 W. Jefferson Street
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-7530

STEVE CARTER
Attorney General of Indiana
Indiana Government Center South
Fifth Floor
402 West Washington Street
Indianapolis, IN 46204
(317) 232-6201

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321

MIKE MCGRATH
Attorney General of Montana
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

DAVID SAMSON
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 080
Trenton, NJ 08625
(609) 292-8576

WAYNE STENEHJEM
Attorney General of North Dakota
State Capitol
600 E. Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210

ROBERT T. TORRES
Attorney General of the Northern Mariana Islands
2nd Floor
Hon. Juan A. Sablan Memorial Bldg.
Capitol Hill
Saipan, MP 96950
(670) 664-2341

BETTY D. MONTGOMERY
Attorney General of Ohio
30 E. Broad Street
17th Floor
Columbus, OH 43215
(614) 466-8980

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105-4894
(405) 521-3921

HARDY MYERS
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97310
(503) 378-4732

MARK BARNETT
Attorney General of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070
(605) 773-3215

JOHN CORNYN
Attorney General of Texas
P.O. Box 12528
Austin, TX 78711-2548
(512) 936-1824

MARK L. SHURTLEFF
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114
(801) 538-9600

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INTEREST OF THE AMICI

The *amici* States, like Wyoming, are responsible for enacting and administering tax systems within their respective jurisdictions. These tax systems produce revenues which support critical government functions such as criminal justice systems, fire and police protection, and educational systems. Many amici States tax property belonging to railroads such as the Burlington Northern or wish to tax such property but are discouraged from doing so because they may be subjected to suit in federal court under the abrogation provision of the Railroad Revitalization and Regulatory Reform Act–the statute at issue in this case.

In enacting and administering their tax systems, States may choose to tax properties differently taking into account local conditions and expressed public policy preferences of their electorate without affronting the Equal Protection Clause of the Fourteenth Amendment. The undue injection of federal courts into State tax matters risks serious disruption of State tax programs and unduly infringes not only on the practical aspects of tax administration but subjects the sovereign States to the indignity of being sued in federal court by private citizens.

SUMMARY OF ARGUMENT

1. This case presents an important issue of federal law which has not been, but should be, reviewed by this Court. The lower federal courts and judges have reviewed the 4-R Act's abrogation with widely differing conclusions. The important and recurring issue of whether Congress validly abrogated the States' sovereign immunity under the 4-R Act counsels that this Court address this issue to avoid any future split among the federal courts.

2. The 4-R Act is not the only federal statute containing an abrogation clause. The Motor Carrier Act contains a similar abrogation provision which extends preferential tax protection to motor carriers of property and passengers. Adjudication of the Constitutionality of Congress's abrogation under the 4-R Act will help address the same issue under the Motor Carrier Act.

3. To find the 4-R Act a valid enactment under the enforcement clause of the 14th Amendment results in the 4-R Act substantively redefining the rights afforded taxpayers by the Equal Protection Clause of the Fourteenth Amendment. Congress can only validly abrogate the States' sovereign immunity when enforcing the Fourteenth Amendment. A substantive Congressional redefinition of the Equal Protection Clause is prohibited by the Constitutional structure. Further, the invasion of the States' sovereign immunity under the 4-R Act strikes at the States' ability to furnish essential government services as well as affronts the dignity of the States as co-equal sovereigns in the federal system.

ARGUMENT

I. The Railroad Revitalization Act of 1976, Which Implicates Important Principles of State Sovereign Immunity and Autonomy, Has Spawned Considerable and Increasing Litigation.

In 1976, Congress enacted Section 306 of the Railroad Revitalization and Regulatory Reform Act (4-R Act). Pub. L. No. 94-210, § 306, 90 Stat. 31, 54-55, *codified as amended at* 49 U.S.C. § 11501.[1] Section 306 declared that certain acts "unreasonably burden and discriminate against interstate commerce, and a State, ... or authority acting for a State ... may not do any of them."

> In broad terms, Congress declared in § 306(b) that assessment ratios or taxation rates imposed on railroad property which differ significantly from the ratios or rates imposed on other commercial and industrial property are prohibited as burdens on interstate commerce.

Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 457 (1987). Section 306 then purported to abrogate the

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[1]Congress recodified the 4-R Act in 1978, moving Section 306 and slightly altering its language, but making no substantive change. Revised Interstate Commerce Act, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. *See* H.R. Rep. 95-1395, at 178-79, *reprinted in* 1978 U.S.C.C.A.N. 3009, 3013. *See also Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Congress again moved Section 306 without substantive change as part of the ICC Termination Act of 1995. *See* Pub. L. No. 104-88 § 102(a), 109 Stat. 803, 845.

States' sovereign immunity and subject them to suit in federal court. *See* 49 U.S.C. § 11501(c).

The important nature of this case is set against the backdrop of the critical role States play in the federal system.

> The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, ... underscore the vital role reserved to the States by the constitutional design.

Alden v. Maine, 527 U.S. 706, 713 (1999). This Court has consistently recognized the textual, structural, historical, ideological and practical principles of State sovereign immunity. *See, e.g., Bd. of Trustees v. Garrett,* 531 U.S. 356 (2001); *Kimel v. Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Ed. Exp. Bd.* ,527 U.S. 666 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261 (1996); *Monaco v. Mississippi*, 292 U.S. 313 (1934); *In re New York*, 256 U.S. 490 (1921); *Hans v. Louisiana*, 134 U.S. 1 (1890).

Section 306 has engendered a "considerable amount of litigation" because of its substantive provisions and the large amounts of money at issue. Jay M. Zitter, *Validity, Construction, and Effect of § 102(a) of the Railroad Revitalization and Regulatory Reform Act (49 U.S.C.S. § 11501)*, 143 A.L.R. Fed 347, 364 (1998). Likewise, the infringement of State sovereign immunity under the 4-R Act helped, at least in part, to contribute to "federal courts [] becom[ing] forums for a considerable amount of litigation over the statute's construction." I Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* 4-210 & n. 926 (3d ed. Nov. 2001). Indeed, the number of reported cases

contained in the American Law Reports Annotation on Section 306 exceeds seventy-seven. *See* 143 A.L.R. Fed at 358-61 & Supp.

The 4-R Act is still a rich font of considerable litigation and disagreement. While several Courts of Appeal have concluded that the 4-R Act validly abrogated State immunity under Congress's section five enforcement power of the Fourteenth Amendment, *see Union Pac. R.R. Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999); *Wheeling & Lake Erie Ry. Co. v. Pub. Utility Comm'n*, 141 F.3d 88 (3d Cir.1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line R.R. Co. v. Department of Rev.*, 139 F.3d 1259 (9th Cir.1998), these views are not unanimously shared among all jurists on the federal bench.

The District Court for Wyoming found the 4-R Act's purported abrogation invalid, *Union Pac. R.R. v. Burton*, 949 F. Supp. 1546, 1554 (D. Wyo. 1996), a conclusion also reached by another district court, although reversed on appeal. *Union Pacific R.R. Co. v. Utah*, 996 F. Supp. 1358, 1362 (D. Utah 1997), *rev'd*, 198 F.3d 1201 (10th Cir. 1999). Further, the District Court for the Southern District of West Virginia reached the same conclusion that the 4-R Act's abrogation was invalid, although the Court of Appeals reversed the decision on other grounds. *See CSX Trans. v. Bd. of Pub. Works*, 997 F. Supp. 749, 752 (S.D. W. Va. 1997), *rev'd on other grounds*, 138 F.3d 537 (4th Cir.), *cert denied*, 525 U.S. 821 (1998).

Further, Judge Garth dissented from the holding in *Wheeling & Lake Erie* that the 4-R Act validly abrogated the States' sovereign immunity. 141 F.3d at 97 (Garth, J., dissenting). And, the Fourth Circuit recognized, albeit in the context of avoiding the abrogation issue and reversing the district court, that "[t]he district court raised a controversial issue, which in some appropriate future case will need to be resolved." *CSX*

Trans., v. Bd. of Pub. Works, 138 F.3d 537, 540 n.4 (4th Cir.), *cert denied*, 525 U.S. 821 (1998).

Indeed, the number of States petitioning for certiorari — States as diverse as California, Pennsylvania and West Virginia — indicates the contemporary relevance, importance and recurrence of this "controversial" issue. *See California State Bd. of Equal. v. Southern Pac. Trans. Co.*, 528 U.S. 1114 (2000); *California State Bd. of Equal. v. Atchinson, Topeka & Santa Fe Ry. Co.*, 428 U.S. 1114 (2000); *Wheeling & Lake Erie Ry. Co. v. Pennsylvania Pub. Utilities Comm'n*, 528 U.S. 928 (1999); *West Virginia Bd. of Pub. Works v. CSX Trans.*, 525 U.S. 821 (1998).

The ramifications for the States and the railroads are tremendous and are brought into stark relief by considering the extent of railroads throughout the United States. In the United States, railroads are classified as Class I, II, or III depending on adjusted annual operating revenue. 49 C.F.R. § 1201.1-1 (2001). In 2001, Class I "line haul freight railroads [had] operating revenue in excess of $261.9 million." Association of American Railroads, *Class I Railroad Statistics,* www.aar.org/PubCommon/Documents/AboutThe Industry/statistics.pdf (last updated Apr. 16, 2002). In 2001, there were eight Class I freight railroads systems in the United States. *Ibid.* Two Canadian Railroad Companies own railroads in the United States that by themselves would constitute Class I railroads. *Ibid.*

Examples of the extent of Class I railroads in the United States are the Union Pacific Railroad, one of the country's largest railroads with 33,586.3 miles of track in 23 states in the western two-thirds of the United States and owning 6,921 locomotives and 153,272 freight cars, Union Pac. R.R., *General Public Overview*, www.uprr.com/aboutup/uprrover.shtml (visited May 13, 2002), Kansas City Southern Railway that operates 3,130 miles of track in eleven central and southeastern states, Kansas

City Southern Railway, *Kansas City Southern Rail Network*, www.kcsi.com/kcsr_m.html (visited May 13, 2002), and CSX Transportation a "major eastern railroad, provid[ing] rail transportation and distribution services over a 22,700 route-mile network in 23 states, the District of Columbia and two Canadian provinces," CSX Corp., *Co. Profile*, www.csx.com/aboutus/company/profile/ (visited Apr. 25, 2002). The Class I railroads alone operate rolling stock of 19,745 locomotives (2001 projected data) and 560,154 freight cars (2000 data). Association of American Railroads, *Class I Railroad Statistics, supra.*

Also illustrative of the importance and widespread implications for the States and the railroads are statistics relating to the Class II and III railroads. For example, Alabama has 5 Class I and 18 Class III railroads, Alabama Dep't of Trans., *Statewide Trans. System Overview*, www.dot.state.al.us/ bureau/transportation_planning/stateplan/system_overview.htm (visited May 13, 2002), Arkansas has 3 Class I and 23 Class III railroads, Arkansas State Highway and Trans. Dep't & Federal Highway Admin., *Arkansas Statewide Long-Range Intermodal Transportation Plan* 37 (Feb. 2002), Minnesota has (including 4 Class I railroads) 856 miles of track among 6 Class II railroads and 764 miles of track among 14 Class III railroads, Minnesota Dep't of Trans., *Railroad Transportation in Minnesota*, www.dot.state.mn.us/ ofrw/railroads.html (visited May 9, 2002), Ohio has (including 3 Class I railroads) 4 Class II and 23 Class III railroads, Ohio Dep't of Trans., Fact Book, *Rail Trans.*, www.dot.state.oh.us/planning/Urban/Fact%20Book/sect15.pdf (visited May 9, 2002), and as of 1999 Texas had 3 Class I railroads, 1 Class II railroad and 39 Class III railroads. Railroad Comm'n of Texas, *Railroads Operating in Texas-1999*, www.rrc.state.tx.us/divisions/rail/99operrr.htm (visited May 13, 2002). Thus, this case affects a major industry and the vast majority of States, involves considerable sums of public revenue

and raises an important constitutional question that will reappear until definitively decided by this Court.[2]

This case presents an appropriate vehicle to settle the "controversial" and important issue of whether Congress in the 4-R Act exceeded its authority, affronted the States' sovereign immunity and invaded the judiciary's "province and . . . duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *See Calhoon v. Harvey*, 379 U.S. 134, 137 (1964) (footnote omitted) ("Because of the importance of the questions presented and conflicting views in the courts of appeals and the district courts, we granted certiorari."); *Heffron v. International Soc. for Krishna Consciousness*, 452 U.S. 640, 646 (1981) ("We granted the state officials' petition for writ of certiorari in light of the important constitutional issues presented and the conflicting results reached in similar cases in various lower courts.")

Further, because "a number of decisions exhibit some tension on" the questions raised in the petition, this Court should grant the writ in order to "to forestall a possible conflict in the lower courts . . . ." *Dawson Chem. Co. v. Rohm and Hass Co.*, 448 U.S. 176, 185 & n.4 (1980). The Court should grant the Petition to address the important and repetitive question it presents.

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[2]The Court of Appeals for the Second Circuit heard arguments in the appeal in *CSX Trans. v. New York Office of Real Prop. Serv.*, 150 F. Supp.2d 605 (S.D.N.Y. 2001), on April 29, 2002. Likewise, the Fourth Circuit heard arguments on May 7, 2002, in *CSX Trans. v. Bd. of Pub. Works of the State of West Virginia*, No. 01-2492 (4th Cir.) (interlocutory appeal of unpublished decision denying motion to dismiss, *inter alia*, under the Eleventh Amendment).

II. The 4-R Act Is Not the Only Federal Statute Which Grants Preferential Treatment to Certain Taxpayers from Presumptively Constitutional State Taxes.

The 4-R Act is not the only federal statute in which Congress has limited the States' taxing power and then sought to strip them of their sovereign immunity. In the Federal Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823-24 (codified as amended at 49 U.S.C. § 14502),[3] "[C]ongress extended to motor vehicle carriers protection against discriminatory state property taxes that is similar to protection it had previously enacted for railroads." I Hellerstein & Hellerstein, *supra,* at 4-213. Congress expanded this preferential protection from state tax burdens to motor carriers of passengers as well as to motor carriers of property in the Bus Regulatory Reform Act of 1982. Pub. L. No. 97-261, § 20, 96 Stat. 1102, 1122 (currently codified at 49 U.S.C. § 14502)). Because the Motor Carrier Act's abrogation provision was based upon and is almost identical to Section 306, "cases construing the 4-R Act and its legislative history are relevant to an analysis of the MCA." *ABF Freight System v. Tax Div.*, 787 F.2d 292, 299 n.1 (8th Cir. 1986).

These creeping inroads on state sovereign immunity give point to Justice O'Connor's observation that:

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[3]Congress moved section 31 of the Motor Carrier Act without substantive change in the ICC Termination Act of 1995. *See* Pub. L. No. 104-88, §§ 103, 14502, 109 Stat. 803, 852, 900-901; *Bruker Instruments v. Bay State Moving Systems*, 15 F. Supp.2d 156, 157 n.2 (D. Mass. 1998).

> [E]rosion of state sovereignty is likely to occur a step at a time. "If there is any danger, it lies in the tyranny of small decisions–in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell."

South Carolina v. Baker, 485 U.S. 505, 533 (1998) (O'Connor, J., dissenting) (quoting Laurence Tribe, *American Constitutional Law* 318 (2d ed. 1988)). As James Madison observed in the *Federalist Papers*, "It will not be denied that power is of an encroaching nature and it ought to be effectively restrained from passing the limits assigned to it." *The Federalist* 48 at 276 (James Madison) (Clinton Rossiter ed. 1999 reprint). The Court should grant the Petition to address the important question it raises as the resolution will affect other federal statutes beyond the 4-R Act.

III. The Area of Taxation Is of Vital Importance to the States as it Is One of the Most Basic (If Not the Most Basic) Powers of Sovereignty and an Indispensable Attribute for Political Survival.

"[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy & O'Connor, JJ., concurring). "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)), *quoted in Gregory v. Ashcraft*, 501 U.S. 452, 458 (1991). *See also Printz v. United States*, 521 U.S. 898, 921

(1997) ("This separation of the two spheres is one of the Constitution's structural protections of liberty.")

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory, 501 U.S. at 458. The concentration of power in the hands of any one branch of government or in one of the two sovereigns making up the Union "may justly be pronounced the very definition of tyranny." *The Federalist* 47 at 269 (James Madison) (Clinton Rossiter ed., 1999 reprint). The 4-R Act violates these basic principles of federalism and the structural separation of powers created in the Constitution.

A. Construing the 4-R Act as premised on the Congressional enforcement power under Section 5 of the 14th Amendment, results in Congressional redefinition of this Court's Equal Protection jurisprudence. Because Congress does not enforce a right by redefining it, Congress could not have validly abrogated the States' immunity under Section 5.

Congress lacks the power under Article I of the Constitution to abrogate the States' Eleventh Amendment immunity. *Bd. of Trustees v. Garrett*, 531 U.S. at 364. Congress may abrogate the States' immunity only under its enforcement power contained in Section 5 of the Fourteenth Amendment. *Id.* Congress, however, does not enforce a right by redefining what

a right is in contravention Supreme Court pronouncements. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Construing the 4-R Act as being supported by the 14th Amendment results in a Congressional redefinition of Fourteenth Amendment discrimination — an act invading the sovereign immunity of the States and usurping the "duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. at 177.

This Court has repeatedly said, "[i]nherent in the power to tax is the power to discriminate in taxation." *Medlock v. Leathers*, 499 U.S. 439, 451 (1991). "The restriction that [the power to tax] shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal . . . classification for taxation . . . ." *State Bd. of Tax Comm'rs. v. Jackson*, 283 U.S. 527, 537 (1931). *See also Kahn v. Shevin,* 416 U.S. 351, 355 n.10 (1974); *Caskey Bakery Co. v. Virginia,* 313 U.S. 117, 121 (1941); *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U.S. 350, 367-68 (1914). "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized," and has "only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies." *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940) (footnote omitted). Because classification has traditionally been used to fit tax programs to local needs and usages to obtain a fair allocation of the tax burden, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Id.* at 88. *See also Nordlinger v. Hahn,* 505 U.S. 1, 11-12 (1992); *Mueller v. Allen,* 463 U.S. 388, 396 (1983); *Regan v. Taxation without Representation*, 461 U.S. 540, 547 (1983); *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 40-41 (1973); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938); *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 294 (1898).

There is no real question that the 4-R Act forbids State tax classifications which are well within the permissible limits the Equal Protection Clause imposes.[4] Indeed, "This Court has approved the adoption of modes and methods of assessment and administration peculiar to railroads and upheld tax rates for railroads differing from those on other property...." *New York Rapid Transit Corp. v. City of New York*, 303 U.S. at 579 (citations omitted). In short, "so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another...." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940). *See also Florida Cent. & P.R. Co. v. Reynolds*, 183 U.S. 471, 480 (1902). States are not

> required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value, [for otherwise,] "the essential taxing power of the State [would be subjected] to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

Allied Stores v. Bowers, 358 U.S. 522, 527 (1959), *quoting Ohio Oil Co. v. Conway*, 281 U.S. 146, 159 (1930). The 4-R Act thus

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[4]This point is so obvious that one railroad actually conceded it — at least until the *City of Boerne* decision. In a brief filed in the Court of Appeals, CSX Transportation argued, "'Congress may statutorily define federal equal protection rights and prescribe remedies to enforce them, irrespective of how the courts may have interpreted them. Section 306 is precisely such a statute.'" *Quoted in CSX Trans. v. Bd. of Pub. Works*, 138 F.3d 537, 540 n.4 (4th Cir. 1998).

prohibits that which the Fourteenth Amendment clearly permits. The 4-R Act subjects the States "to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.'" *Allied Stores*, 358 U.S. at 527. Congressional abrogation in the 4-R Act is invalid and this Court should grant certiorari in this case to definitively announce this conclusion.

B. Congress skewed the delicate balance between the States and the Federal government and interfered with the most important sovereign attribute of any government–the power to tax.

Respondents will presumably assert that the question presented in this case is of little national importance because, even if the 4-R Act's abrogation of the Eleventh Amendment is found unconstitutional, the federal courts would still have jurisdiction over 4-R Act claims under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Powerful arguments can be levied, however, against application of the *Ex parte Young* doctrine to tax cases. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 281 (*Ex parte Young* action may not be maintained if it implicates a State's "special sovereignty interests"); *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995) (quoting *Dows v. Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871))("'It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.'"); *Bank of Commerce v. Tennessee*, 161 U.S. 134, 136 (1896)("Taxes [are] the sole means by which sovereignties can maintain their existence[.]"); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819) (Marshal, C.J.) ("[T]he power of taxing the people and their property is essential to the very existence of

government . . . ."). *Accord Arkansas v. Farm Credit Services*, 520 U.S. 821, 826 (1997); *State Bd. of Tax Comm'rs v. Jackson*, 283 U.S. at 537; *Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 29 (1873). Indeed, the Tenth Circuit has concluded that a State's exercise of the taxing power is a special sovereign interest beyond the application of the doctrine of *Ex parte Young*. *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1189-94 (10th Cir. 1998). As the Tenth Circuit has said:

> We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the lack of any ownership of land, *cf.* [*Idaho v.*] *Coeur d'Alene Tribe*, 117 S.Ct. [2028,] 2041 [(1996)], it is impossible to imagine that a state government could continue to exist without the power to tax.

Id. at 1193. *See also Neinast v. Texas*, 217 F.3d 275, 282 (5th Cir. 2000) (defining the authority of a State to choose revenue sources as a "core state power.").

This Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. at 586. Congress itself enacted 28 U.S.C. § 1341 providing, "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." This broad provision (which the Congress vitiated in the 4-R Act, *see* 49 U.S.C. § 11501(c); *Oregon Rev. Dep't v. ACF Indust.*, 510 U.S. 332, 342 (1994)), is best understood as but

a "partial codification of the federal reluctance to interfere with state taxation," *National Private Truck Council*, 515 U.S. at 586, as evidenced by cases which, post-section 1341, have precluded actions against States for relief not covered by Section 1341's terms. *See Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1942); *Green v. Mansour*, 474 U.S. 64, 72 (1985) ("In *Great Lakes Co. v. Huffman* ... we held that a declaratory judgment was not available to obtain a determination of the constitutionality of a state tax even though the relevant federal statute prohibited federal courts only from issuing injunctions against the collection of such taxes").

The 19 States in the Third, Ninth, and Tenth Circuits, however, have no recourse to these compelling arguments as their Courts of Appeal have already upheld the 4-R Act's abrogation of the States' immunity. Only this Court's review of the question presented in this case can restore the sovereign interests impaired by those circuit court decisions.

More generally, all States, regardless of the circuit within which they are located, can only definitively free themselves of improper federal court interference with their tax collection if this Court favorably resolves the abrogation issue — whether before or after the Court addresses the *Ex parte Young* issue.[5]

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[5]The Fourth Circuit is the only court of appeals to have specifically held that a 4-R Act case may proceed in federal court under the *Ex parte Young* exception. See *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998). In that case, however, the Court did not address the *Coeur d'Alene* "special sovereignty interest" argument. The State of West Virginia has recently asked the Fourth Circuit to revisit its prior holding in light of *Coeur d'Alene*.

It cannot be forgotten that States are not mere political provinces subsidiary to the federal government. *See Alden v. Maine*, 527 U.S. 706, 715 (1999); *New York v. United States*, 505 U.S. 144, 188 (1992). States retain "a residuary and inviolable sovereignty." *The Federalist* 39 at 213 (James Madison) (Clinton Rossiter, ed. 1999 reprint). Indeed, the Eleventh "Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993).

Moreover, there is an extremely pragmatic aspect of federalism. The tax power is not only an "indispensable attribute of sovereignty," it is absolutely necessary to support government, maintain law and order and protect life and property. *In re West Coast Rubber Corp.*, 290 F. 160, 161 (9th Cir. 1923), *aff'd*, 268 U.S. 1 (1925). The States are primarily responsible for governing the polities that daily touch most directly every facet of life–facets reaching from the monumental to the mundane. They posses primary responsibility for defining and enforcing criminal law, *e.g., Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), for providing life sustaining services such as fire and police protection, *see New Jersey v. New York*, 523 U.S. 767, 793 (1998), for providing education to our nation's posterity, *e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), for regulating the professions which practice within their borders, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978), and for maintaining public access roads. *See United Air Lines v. Mahin*, 410 U.S. 623, 630 (1973).

This Court has "long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration." *National Private Truck Council*, 515 U.S. at 586. When a federal court is allowed to hear a state tax matter,

> state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). *Cf. McKesson Corp. v. Div. of Alcoholic Bev.*, 469 U.S. 18, 38 & n.19 (1990). "Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Perez*, 401 U.S. at 128 n.17. *Compare* 49 U.S.C. § 11501(c) ("The burden of proof in determining assessed value and true market value is governed by State law"); *id.* § 14502(c)(3) (same).

In short, "[t]he federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the Federal Judiciary," *Arkansas v. Farm Credit Services*, 520 U.S. at 826, especially since the interests of the States in the integrity of their tax processes is of "particular moment." *Id.*

This Court should grant certiorari to resolve whether Congress validly abrogated the States' sovereign immunity concerning the paramount power of political existence or if it dangerously skewed "the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Alden*, 527 U.S. at 757. *Cf. Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961) (certiorari granted on tax question "because of the importance to the new State of Alaska").

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

D. Michael Fisher
Attorney General
Commonwealth of Pennsylvania

John G. Knorr, III
Chief Dep. Atty. Gen.
Commonwealth of Pennsylvania

Office of the Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-1144

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Darrell V. McGraw, Jr.
Attorney General
State of West Virginia

Katherine A. Schultz
Sr. Dep. Atty. Gen.
State of West Virginia

Scott E. Johnson*
Sr. Asst. Atty. Gen.
State of West Virginia

State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
(304) 558-2021
Counsel for Amici States

*Counsel of Record